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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/901,979	07/10/2001	Lutz Heuer	Bayer 8890.4-KGB	8954
27384	7590	03/18/2002	EXAMINER	
KURT BRISCOE NORRIS, MC LAUGHLIN & MARCUS, P.A. 220 EAST 42ND STREET, 30TH FLOOR NEW YORK, NY 10017			ROBINSON, ALLEN JAY	
		ART UNIT	PAPER NUMBER	
		1616		

DATE MAILED: 03/18/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No. <b>09/901,979</b>	Applicant(s) <b>Heuer et al.</b>
Examiner <b>Allen J. Robinson</b>	Art Unit <b>1616</b>

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

1)  Responsive to communication(s) filed on Feb 8, 2002

2a)  This action is FINAL.      2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

### Disposition of Claims

4)  Claim(s) 7-14 is/are pending in the application.

4a) Of the above, claim(s) 8, 13, and 14 is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 7 and 9-12 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

11)  The proposed drawing correction filed on \_\_\_\_\_ is: a)  approved b)  disapproved.

12)  The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. § 119

13)  Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

a)  All b)  Some\* c)  None of:

1.  Certified copies of the priority documents have been received.
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\*See the attached detailed Office action for a list of the certified copies not received.

14)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

### Attachment(s)

15)  Notice of References Cited (PTO-892)

16)  Notice of Draftsperson's Patent Drawing Review (PTO-948)

17)  Information Disclosure Statement(s) (PTO-1449) Paper No(s). 7

18)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_

19)  Notice of Informal Patent Application (PTO-152)

20)  Other: \_\_\_\_\_

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As per a restriction requirement made October 11, 2001, Applicants elected with traverse (paper number 6 ) the synergistic combination of cyproconazole and tebuconazole. Applicants' traverse is considered; however, the requirement is deemed proper and adhered to for reason of record as set forth in paper number 4. The specific elected invention of the synergistic combination supra is clearly patentable distinct from another different and non-related synergistic combination such as the synergistic combination of (1) cyproconazole and (2) quaternary ammonium compounds or copper compounds. The different synergistic combinations are non-related to each other, have different fields of search and can support separate patents. Therefore, the above restriction requirement is deemed proper, adhered to and made final.

Claims 8, 13 and 14 are withdrawn from consideration as being drawn to non-elected inventions.

Claims 7 and 9-12 are acted upon on their merits to the extent that they read on the elected invention. The claims will also be examined to include all the azoles set forth in claim 10.

Claims 7 and 9-12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 7 and 9-12 are indefinite in failing to set forth all relative proportions for all ingredients. The function language in the claims is noted, however, said language does not negate the need for numerical amounts for synergistic combinations.

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***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103© and potential 35 U.S.C. 102(f) or (g) prior art under 35 U.S.C. 103(a).

Claims 7 and 9-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over Buchel et al. (AH), European Patent 0393746 (AQ) and Worthing et al. (R).

The Buchel et al. and the European Patent references teach that the claim designated azole compounds, analogs and/or isomers and mixtures thereof may be used to control microbes such as fungi may be used to protect industrial material of the type claimed. (See page 4 of the European Patent; and column 154 of the Buchel et al. reference). The Worthing et al. reference

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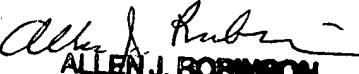
teaches that the claim designated azoles are old fungicides. The above references fail to teach specific examples of the old fungicides together. However, one skilled in this art would find ample motivation from the prior art supra to combine the well known fungicides together, of known properties where the results obtained thereby are no more than the additive effects of the ingredients; particularly since the above prior art teaches the combination of known fungicides. In re Sussman, 1943 C.D. 518. The specification fails to set forth any data showing unexpected and/or unobvious results for all the claimed combinations to control all the microbes claimed. Clearly data is needed.

References AA-AD, AF, AG, AJ, AL and AR-AY are cited to show the state of the art.

It is queried how reference AE relates to the instant invention.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Allen J. Robinson whose telephone number is (703) 308-4524.

AJR  
March 15, 2002

  
ALLEN J. ROBINSON  
PRIMARY EXAMINER